

STATE OF MICHIGAN
COURT OF APPEALS

THOMAS A. DUKE COMPANY,

Plaintiff-Appellant,

v

TIMOTHY C. PAUL, a/k/a TIM PAUL,

Defendant-Appellee.

UNPUBLISHED

October 8, 1999

No. 208185

Oakland Circuit Court

LC No. 95-499940 CK

Before: Zahra, P.J., and Saad and Collins, JJ.

PER CURIAM.

Plaintiff appeals as of right from a bench trial judgment of no cause of action in favor of defendant in this breach of contract case. We affirm.

In July 1994, plaintiff, a commercial real estate broker, entered into an independent contractor agreement with defendant, a licensed real estate agent. The parties agree that under the terms of the agreement, the relationship was terminable at will by either party. In March 1995, plaintiff terminated the relationship. Plaintiff notified defendant that, pursuant to their contract, defendant owed plaintiff for draws on commission that he had accepted from plaintiff. Defendant did not pay plaintiff, and plaintiff filed suit to recover the amounts he alleged were owing. Defendant filed a motion for summary disposition, arguing that under the parties' agreement, no liability existed against either party upon termination of the contract. The trial court agreed with defendant that paragraph eleven of the parties' agreement excused him from liability for the amount of draws outstanding at termination. The trial court granted defendant's motion for summary disposition and plaintiff appealed.

On appeal, this Court agreed with the trial court that the language of paragraph eleven should be interpreted to mean that defendant's liability to plaintiff was extinguished when the contract was terminated. *Thomas A. Duke Co v Paul*, unpublished opinion per curiam of the Court of Appeals, issued April 15, 1997 (Docket No. 194832). However, this Court did not agree that such an interpretation supported a grant of summary disposition. *Id.* Citing three other provisions of the contract, this Court found that, when read as a whole, the contract was ambiguous with regard to whether defendant was required to repay the outstanding draws after termination. *Id.* Because the

interpretation of an ambiguous contract is a question of fact, this Court reversed the trial court's grant of summary disposition. *Id.*

Following a bench trial in this matter, the trial court issued an opinion and entered an order dismissing plaintiff's claim. The trial court found that paragraphs six and eleven of the parties' agreement were in conflict on the issue of whether defendant was required to repay outstanding draws after termination. The court reasoned that in order for plaintiff to rely on paragraph six of the parties' agreement, which states that draws against future commissions are loans, plaintiff must have treated the draws as loans. However, the court further found that when plaintiff issued defendant Form 1099 for income tax purposes, plaintiff treated defendant's draws against future commissions as nonemployee compensation. The court then concluded that paragraph eleven extinguished defendant's liability, and, as a result, plaintiff had no cause of action.

Plaintiff first argues on appeal that the trial court clearly erred in ruling that the contract was ambiguous as to whether defendant was required to repay draws after termination. We disagree. The initial question of whether contractual language is ambiguous is a question of law. *Brucker v McKinlay Transport, Inc (On Remand)*, 225 Mich App 442, 447-448; 571 NW2d 548 (1997). If the contractual language is unambiguous, then its meaning is also a question of law. *Id.* at 448. If the contractual language is unclear or susceptible to multiple meanings, interpretation is a question of fact. *Id.* We review questions of law de novo and factual findings under the "clearly erroneous" standard of review. *Id.*

Plaintiff argues that in ruling that the contract at issue was ambiguous, the trial court erroneously created a conflict between paragraphs six and eleven where a conflict did not exist. However, this Court held in the prior appeal in this case that "the contract is ambiguous on the issue of whether the monthly draws must be repaid after the contract is terminated." *Thomas A. Duke Co v Paul*, unpublished opinion per curiam, issued April 15, 1997 (Docket No. 194832). In so ruling, this Court found that the provisions of the contract which specifically addressed draws, including paragraph six, conflicted with paragraph eleven. Because the trial court was bound by the law of the case with regard to the issue of whether the contract was ambiguous, it did not err in concluding, consistent with our previous decision in the matter, that the contract was ambiguous.

Under the law of the case doctrine, a ruling by an appellate court with regard to a particular issue binds the appellate court and all lower tribunals with respect to that issue. *Driver v Hanley (After Remand)*, 226 Mich App 558, 565; 575 NW2d 31 (1997). Accordingly, a question of law will not be decided differently on remand or in a subsequent appeal in the same case, nor can the trial court take any action on remand that is inconsistent with the judgment of the appellate court. *Kalamazoo v Corrections Dep't (After Remand)*, 229 Mich App 132, 135; 580 NW2d 475 (1998); *Driver, supra*. The law of the case doctrine applies only to questions actually decided in the prior decision and to those questions necessary to the court's prior determination and only if the facts have remained materially the same. *Kalamazoo, supra*; *Driver, supra*. Moreover, this rule applies without regard to the correctness of the prior determination. *Id.*

Citing *Borkus v Michigan Nat'l Bank*, 117 Mich App 662, 666; 324 NW2d 123 (1982), plaintiff contends that the law of the case doctrine does not apply here because the earlier Court of Appeals decision did not reach the merits of this case. Plaintiff's reliance on *Borkus* is misplaced. In the earlier Court of Appeals decision in *Borkus*, this Court made no ruling on a question of law prior to reversing the trial court's grant of summary disposition; it simply ruled that a factual question remained that precluded summary disposition. *Id.* at 665, 667. In its earlier decision in this case, this Court ruled as a matter of law that the contract at issue was ambiguous. That ruling was necessary to this Court's determination that the trial court had erred in granting summary disposition on the basis that there existed no genuine issue of fact. It was then left to the trier-of-fact in the lower court to resolve the ambiguity. *Bruckner, supra*.

Plaintiff further argues that the law of the case doctrine does not apply here because the facts before this Court on this appeal are not materially the same as those before this Court in the first appeal. See *Kalamazoo, supra*. Plaintiff contends that because this Court now has the full trial record before it, it has facts necessary to ruling on whether the contract is ambiguous that it did not have at the time of its earlier decision. However, the contract at issue in this case is the same contract considered by this Court in the earlier appeal. This Court found that contract to be ambiguous as written. Although this Court now has the benefit of the trial record, which shows how the trial court interpreted the contract, neither party alleges any factual changes with regard to the documents representing the agreement itself. Accordingly, the trial court did not err in finding the contract at issue to be ambiguous.

Plaintiff's second argument on appeal is that the trial court erred in considering the income tax forms ("1099's") plaintiff issued to defendant when it interpreted the parties' contract, because the contract is unambiguous. We disagree. As discussed above, the contract in question is ambiguous with regard to whether defendant was required to repay draws after his termination. Extrinsic evidence is admissible to clarify the meaning of an ambiguous contract. *Meagher v Wayne State Univ*, 222 Mich App 700, 722; 565 NW2d 401 (1997). Moreover, plaintiff introduced the subject of the 1099's on direct examination of its witness, Duke, and admitted copies of the 1099's it issued to defendant in 1994 and 1995 into evidence as an exhibit at trial. Plaintiff cannot now seek reversal on the basis that the trial court considered evidence that plaintiff asked the trial court to consider. See *City of Detroit v Larned Associates*, 199 Mich App 36, 38; 501 NW2d 189 (1993). Accordingly, the trial court did not err in considering the 1099's when interpreting the parties' contract.

Affirmed.

/s/ Brian K. Zahra
/s/ Henry William Saad
/s/ Jeffrey G. Collins